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Nos. 93-517, 93-527 and 93-539

In the Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioners,

-against-

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR PETITIONER BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT

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QUESTIONS PRESENTED

Chapter 748 of the 1989 Laws of the State of New York creates a Kiryas Joel Village School District with boundaries coterminous with the existing boundaries of the Incorporated Village of Kiryas Joel. Virtually all of the residents of such Incorporated Village are Orthodox Jews who are members of the Satmarer Hasidic community. Property within the Village is privately owned. There are no restrictive covenants prohibiting alienation of the parcels to non-Satmarer.

The trustees of the public school district created by the Chapter are popularly-elected by District residents, and they exercise the same duties and responsibilities as other public school trustees. The school established thereunder offers exclusively secular special education programs and services to handicapped students residing within the Village at a public site; it employs teachers and ancillary staff on a non-sectarian basis to instruct such students; and it follows a state-prescribed curriculum. It does not operate a traditional elementary or secondary school for non-handicapped district students, because such students choose to attend the parochial schools within the Incorporated Village in accordance with the parental preferences of the Satmarer. The questions presented follow:

1. Whether a state statute which creates a public school district with boundaries coterminous with an existing governmental unit in order to facilitate access to secular special education programs and services by disabled students sharing a common religious heritage has an impermissible primary

effect of advancing religion in violation of the First Amendment's Establishment Clause, where such state action was designed and intended to address the social, psychological and cultural needs of such students.

2. Whether the primary effect of a state statute creating a separate public school district in order to facilitate access to secular special education programs and services by handicapped students sharing a common religious heritage impermissibly advances or endorses that shared religious heritage in violation of the First Amendment's Establishment Clause where programs and services are provided directly to the students within the context of a secular public program at a public site utilizing the services of public employees.

3. Whether *Lemon v. Kurtzman*, 403 U.S. 602 (1971) should be overruled and replaced with a constitutional standard which authorizes permissive legislative accommodation to meet the secular educational needs of religious people.

LIST OF PARTIES

The parties to the proceeding below, as required by Supreme Court Rule 29.1, are as follows: petitioners Board of Education of the Monroe-Woodbury Central School District; Board of Education of the Kiryas Joel Village School District; and the Attorney General of the State of New York. Petitioner Board of Education of the Monroe-Woodbury Central School District, a public corporation, has no parent company, subsidiary or affiliate to list pursuant to Rule 29.1.

Respondents below were Louis Grumet and Albert W. Hawk.

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is reported at 81 N.Y.2d 518, 601 N.Y.S.2d 61. The Opinion and Order of the Appellate

Division, Third Department is reported at 187 A.D.2d 16, 592 N.Y.S.2d 123; the Opinion of the Hon. Lawrence E. Kahn in Supreme Court, Albany County is reported at 151 Misc.2d 60, 579 N.Y.S.2d 1004.

JURISDICTION

This Court has jurisdiction to review the Opinion and Judgment of the Court of Appeals of the State of New York pursuant to the Title 28 U.S.C. § 1257, which authorizes review by certiorari of final judgments rendered by the highest court of a state, where the validity of a state statute is in question on the ground that it is repugnant to the Constitution of the United States. The Opinion and Judgment of the Court of Appeals of the State of New York which declares Chapter 748 of the 1989 Laws of the State of New York to be repugnant to the First Amendment of the Constitution of the United States was entered on July 6, 1993. This Court granted a writ of certiorari in Case Nos. 93-517, 93-527 and 93-539 on November 29, 1993

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides, insofar as pertinent, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;".

Chapter 748 of the 1989 Laws of the State of New York creates the Kiryas Joel Village School District;

establishes a mechanism for the popular election of a board of education and vests school trustees with the same powers and duties as trustees of other public school districts. The full text of the Chapter is reprinted at page 105a of the Appendix to Petitioner Board of Education of the Monroe-Woodbury Central School District's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

After this Court rendered its decisions in *Aguilar v. Felton,* 473 U.S. 402 (1985) and *Grand Rapids v. Ball,* 473 U.S. 373 (1985), petitioner Board of Education of the Monroe-Woodbury Central School District was compelled to reexamine the manner in which it had previously provided special education programs and related services to the Satmarer Hasidic handicapped students residing within the Incorporated Village of Kiryas Joel, which was then within the boundaries of the Monroe-Woodbury Central School District. Consistent with what it believed to be its obligations under federal and state law, more particularly the Education of the Handicapped Act (E.H.A.), the precursor to the Individuals With Disabilities Education Act (Title 20 U.S.C. § 1400, *et seq.)* and its state counterparts, Article 89 of the Education Law and Education Law, § 3602-c (commonly known as the "dual enrollment statute"), petitioner ceased to offer special education programs and services at an annex adjacent to and educationally identifiable with one of the parochial schools within the Village.

When the parties were unable to agree on an appropriate alternative method of furnishing such services, the Board of Education brought suit in Supreme Court, Orange County for judgment declaring that the State's "dual enrollment" statute compelled it to furnish special education and related services to non-public school students only within the regular classes of the public schools of the District and not otherwise. The Satmarer counterclaimed for a declaration that such services were required to be provided on the premises of the schools which their children customarily attended. In *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988), the New York State Court of Appeals, relying upon its construction of state law, rejected both positions, concluding instead that the District ". . .is neither compelled to make services available to the private school handicapped children only in the regular public school classes and programs, nor without authority to provide otherwise" (72 N.Y.2d at p. 187).

While the Court of Appeals' decision may have addressed the legal issues, it did not resolve the underlying dispute between the parties. The District Committee on Special Education, recognizing its authority under the decision of the Court of Appeals to continue to make programmatic decisions on an individual basis under applicable federal and state guidelines including the concept of "least restrictive environment", continued in most instances to recommend public school placements for the handicapped students residing within the Village of Kiryas Joel. The Satmarer, adhering to their prior position, declined to accept such services in the regular classes

of the public schools. They pointed to certain prior instances in which Satmarer students had accepted programs and services within the context of public placements but indicated that such placements had proved inappropriate because of such nonreligious factors as the impact upon the children of travelling out of the sheltered environment of the Village; the psychological harm of being thrust into a strange environment; the fact that their physical appearance and language difficulties immediately set them apart from other students; and the necessity for bilingual, bicultural programs specially adapted to meet their social, psychological and cultural needs.

Faced with the continued intractability in the positions of the parties and the consequent failure of the Satmarer to participate in public programs and services, the State Legislature took action in order to facilitate access by the handicapped students residing within the Village to those types of special education programs and services which are required by federal and state law to be made available to all handicapped students. The Legislature enacted Chapter 748 of the Laws of 1989 (Appendix[1] at 105a) which created the Kiryas Joel Village School District with boundaries coterminous with the existing Incorporated Village of Kiryas Joel. The legislation provided that the school district shall be governed by a board of trustees elected by the qualified voters of the Village, which board shall have the same powers and duties as trustees of union free school districts (Education Law, Article 35). The Sponsor's memo in support of the

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1 Page references in this Brief to the Appendix refer to the Appendix to Petitioner Board of Education of the Monroe-Woodbury Central School District's Petition for a Writ of Certiorari.

legislation (Appendix, at 106a-107a), the Governor's Memorandum approving the Chapter (Appendix, at 108a-109a), and the legislative history of the bill clearly indicate that the Kiryas Joel Village School District was created but for a single purpose, *i.e.*, to provide special education and related services to the handicapped students residing within the Village and not to operate a traditional elementary or secondary education program for resident non-handicapped students. Non-handicapped students continue to attend the parochial schools of the Village in accordance with the educational preference of the Satmarer for parochial education for their children.

The Kiryas Joel Village School constitutes a unique, wholly-secular presence within the Incorporated Village. While the Incorporated Village is composed almost entirely of members of the Satmarer Hasidic community, the School itself is staffed on a non-denominational basis, and some students tuitioned to the School by other public school districts are not Satmarer. Governance of the school district is separate and distinct from the religious leadership within the Village.

As is more fully reflected in the affidavit of Philip R. Paterno (Appendix, at 110a) and the affidavit of Steven M. Bernardo (Appendix, at 114a), the Village School is physically separate and apart from and is not proximate to or educationally identifiable with the religious schools within the community. It is secular in appearance, devoid of even the customary mezuzahs on the doorposts. The School is taught by an instructional staff certified by the Commissioner of Education of the State of New York, which is assisted by non-instructional staff selected in

accordance with applicable civil service rules and regulations. The School follows a secular academic calendar. While strict separation of male and female students is practiced within the surrounding community, boys and girls are instructed jointly at the School. Furthermore, the curriculum is secular and is not influenced or dictated by the sex of the student, as would be the practice in the religious schools within the Village. Female teachers instruct male students. This, too, would not occur in the religious schools. In addition, English is the primary language of instruction, although the School offers bilingual and bicultural secular special educational programs. This, too, should be contrasted with the surrounding community, in which Yiddish is the primary language of communication and instruction. Thus, the public school district offers programs and services which in many significant respects are at odds with the basic precepts of Satmarer Hasidim.

SUMMARY OF ARGUMENT

The statute enacted by the New York State Legislature which creates a secular Kiryas Joel Village School District with boundaries coterminous with the existing Incorporated Village of Kiryas Joel for the purpose of providing secular special education programs and services to the disabled Satmarer students residing within the Village is constitutional within the purview of the three-pronged test articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It has valid secular legislative purpose in that it facilitates access by the disabled Satmarer students to bilingual, bicultural educational programs within a secular learning environment

which is receptive to the particular sensitivities and vulnerabilities of such students.

The statute has a primary effect which does not advance religion, because the services provided are part of a general governmental program which distributes benefits neutrally to any child qualifying as disabled under the Individuals With Disabilities Education Act (Title 20 U.S.C. § 1400 *et seq.)* without regard to the sectarian-nonsectarian nature of the educational institution *(Zobrest v. Catalina Foothills School District,* ___U.S. ___, 113 S.Ct. 2462 [1993]; *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481 [1986]).

Furthermore, the services are furnished directly to the disabled students at a public site by public employees, thus avoiding the possibility of excessive entanglement between church and state through creation of a monitoring process designed to ensure that public employees will remain ideologically neutral *(Wolman v. Walter,* 433 U.S. 229 [1977]). Thus, the statute at issue is constitutional under *Lemon, supra.*

The Court below improperly focused upon the common religious heritage of the board members rather than upon the nature of the educational services or the manner in which such services would be provided to the disabled students attending the School. The Court below inferentially concluded that because all board members shared a common faith, they cannot be trusted to administer the public school system in a secular manner. Such reasoning was unequivocally rejected by this Court in *McDaniel v. Paty,* 435 U.S. 618 (1978), in which the Court held

that religious individuals could not constitutionally be compelled to choose between the exercise of civic office and their religious vocations.

This Court has previously recognized the existence of a "zone of permissible accommodation" at the intersection where the Establishment Clause meets the Free Exercise Clause (*County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, et al.*, 492 U.S. 573 [1989]; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 433 U.S. 327 [1987]; *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 [1970]). No party argues that the creation of the Kiryas Joel Village School District was required by the Free Exercise Clause. However, if this Court finds that the District serves a religious rather than a secular purpose for the Satmarer, it should nevertheless sustain the statute as a permissible legislative accommodation to alleviate a burden upon the Satmarers' Free Exercise right to avail themselves of the same types of secular educational programs and services for their disabled students which are generally made available to all handicapped students without regard to the type of schools which they attend, without subjecting such students to the inconsistent, worldly values of traditional public school systems (*Wisconsin v. Yoder*, 406 U.S. 205 [1972]).

The accommodation which the Legislature has fashioned does not advance the religious interests of the Satmarer. Secularism is antithetical to Hasidism, yet secularism is the *quid pro quo* for educational services furnished at the public site. The Kiryas Joel Village School District is the functional equivalent of the neutral site which this Court sustained in

Wolman v. Walter, 433 U.S. 229 (1977). While all the students of the facility may share a common faith (although all are not Satmarer Hasids), instruction is given at a public site through public employees in much the same manner as instruction is given throughout the public schools of the State of New York. Thus, the educational interests of the students, rather than their religious interests, are being advanced by the creation of the separate school district.

It should further be noted that no benefits flow directly to the religious schools or institutions within the Incorporated Village. No public moneys ever find their way into the coffers of the religious schools, nor are such schools relieved of any expenses which they would otherwise be compelled to bear (*Zobrest v. Catalina Foothills School District*, ___U.S. ___, 113 S.Ct. 2462 [1993]; *Grand Rapids School District v. Ball*, 473 U.S. 373 [1985]). If the Kiryas Joel Village School District ceased to exist, petitioner Board of Education of the Monroe-Woodbury Central School District, from whose territory the District was created, would be compelled by federal and state law to resume responsibility for providing educational programs and services to the disabled Satmarer residing within the Village.

If this Court determines that the statute before the Court is inconsistent with *Lemon* and that it cannot be sustained as a permissible legislative accommodation to alleviate a burden upon the Satmarers' Free Exercise rights, this Court should revisit *Lemon*, *supra*, and overrule it to enable the state legislative process to fashion accommodations designed to meet

the secular needs of religious individuals without violating the constitutional rights of third parties.

ARGUMENT

POINT I.

CHAPTER 748 OF THE LAWS OF 1989 CREATING THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT IS CONSTITUTIONAL UNDER THE *LEMON* TEST

The creation of a secular public school district with boundaries coterminous with those of an existing governmental unit for the purpose of providing special education programs and services to disabled students residing within that governmental unit is clearly a valid secular legislative activity. Does it become otherwise merely because substantially all of the residents of that community share a common religious heritage and they have voluntarily chosen to live separate and apart from the broader heterogeneous community in accordance with their tradition of cultural and social isolation from outside influences? We respectfully submit that it it does not.

The New York State Court of Appeals has held that the statute creating the Kiryas Joel Village School District is itself violative of the Establishment Clause of the First Amendment of the United States Constitution because the act will be regarded as effecting a symbolic union of church and state which is "sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their

religious choices. Thus, the principal or primary effect of Chapter 748 of the Laws of 1989 is to advance religious beliefs" (81 N.Y.2d at 529). Utilizing the second prong of the *Lemon* test, *post*, the Court below struck down the statute, the effect of which was to "drap[e] a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their community" (*Grumet, et al. v. Board of Education of the Kiryas Joel Village School District, et al.*, 81 N.Y.2d 518, 557, dissenting opinion of Bellacosa, J.).

It is questionable whether the three-pronged test first articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), represents the current view of a majority of the Justices of this Court with respect to the analysis of potential Establishment Clause violations. The concurring opinion of Justice Scalia in *Lamb's Chapel, et al. v. Center Moriches U.F.S.D.*, ___U.S. ___, 113 S.Ct. 2141, 2150 (1993), suggests that a majority of the Justices through their various opinions have "driven pencils through the creature's heart",[2] yet the majority opinion, at Footnote 7, notes

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[2] Justice Scalia's concurrence collects the various opinions of the Justices which have criticized *Lemon* and have suggested that the Court revisit the test. He notes:

> Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. See *e.g., Weisman, supra*, at 505 U.S. ___, 112 S.Ct. at 2678 (SCALIA, J., joined by, *inter alios*, THOMAS, J., dissenting); *Allegheny*

that "there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled. This case, like *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), presents no occasion to do so."

The *Lemon* test has been broadly criticized for its inflexibility, its unpredictability and for the lack of meaningful guidance which it provides both to governmental bodies and to the courts which seek to invoke its counsel. It is unclear whether *Lemon* continues to command the respect of a majority of the Justices of this Court for analysis of Establishment Clause controversies or whether this Court is now prepared to seek out an alternative analytic framework which provides both greater guidance to governmental entities wishing to conform their

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County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 655-657 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346-349 (1987) (O'CONNOR, J., concurring), *Wallace v. Jaffree*, 472 U.S. 38, 107-113 (1985) (REHNQUIST, J., dissenting); *id.*, at 90-91 (WHITE, J., dissenting); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985) (WHITE, J., dissenting); *New York v. Cathedral Academy*, 434 U.S. 125, 134-135 (1977) (WHITE, J., dissenting); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768 (1976) (WHITE, J., concurring in judgment); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (WHITE, J., dissenting).

actions to the core principles inherent in the Establishment Clause and more consistency in judicial decisions.

Assuming *arguendo* that *Lemon, supra,* continues to be the preferred analytic framework for determining the permissibility of governmental action under the First Amendment's Establishment Clause, we respectfully submit that application of the various elements of the three-pronged test necessarily supports the constitutionality of the disputed statute. *Lemon, supra,* requires that a statute have a secular legislative purpose; that it have a principal or primary effect which neither advances nor inhibits religion; and it must not foster an excessive entanglement with religion. The various components of the test have been alternatively characterized as a "convenient distillation of principles" and "guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired" *(Meek v. Pittinger,* 421 U.S. 349, 358 [1975]) or "no more than helpful signposts" *(Hunt v. McNair,* 413 U.S. 734, 741 [1973]), depending upon the degree of deference accorded the test by the authoring Justice.

(A) The Statute has a Secular Legislative Purpose

The statute at issue establishes a separate school district for the Village of Kiryas Joel under the aegis of a popularly-elected board of education for the purpose of facilitating access to wholly-secular special educational programs and services by disabled students residing within the Village. The principal Assembly sponsor of the bill clearly regarded the

statute primarily as a vehicle for securing such access (Appendix, at 106a-107a), as did the Governor, who in his Approval Memorandum (Appendix, at 108a-109a), noted the history of protracted litigation between the Satmarer and the Monroe-Woodbury Board of Education and the intractable dilemma created by the intransigence of their respective positions with respect to the manner of provision of educational services to the disabled students residing within the Village.

The first prong of *Lemon* is not usually an issue in litigation involving legislation providing funding or services to students attending sectarian schools.[3] valid secular legislative purpose is usually apparent from the legislative history of the statute. Thus, in *Wolman v. Walter*, 433 U.S. 229, 236 (1977), this Court found a legitimate secular legislative purpose in a statute which funded various ancillary services for non-public school students. The Court noted its satisfaction that the challenged statute reflected a "legitimate interest in protecting the health of its youth and providing a fertile educational environment for all the schoolchildren of the State". To the same effect, see *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), in which this Court similarly found a secular legislative purpose in certain programs designed to aid parochial school students, although the programs themselves were ultimately invalidated under the "primary effects" test.

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[3] It should be noted that the Kiryas Joel Village School District is a public school district in all respects and is not a sectarian school under any model of constitutional analysis.

In *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), this Court noted that even if a statute were motivated in part by a religious purpose, this alone would not invalidate it under the first prong of *Lemon*. A statute may be invalidated thereunder only if it is "...entirely motivated by a purpose to advance religion". Subsequently, in *Bowen v. Kendrick, Secretary of Human Health and Services*, 487 U.S. 589 (1988), this Court reaffirmed that a statute may be invalidated under the "purpose" prong only if it is motivated *wholly* by an impermissible purpose. This Court associated itself with the reasoning of the District Court that even if it were assumed that the statute were motivated in part by an improper concern, the fact that it was also motivated in part by other entirely legitimate secular concerns would be sufficient to sustain its constitutionality. In Footnote 8 to the majority opinion, this Court noted: "We see no reason to conclude that the AFLA serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations" (487 U.S. at 604).

The statute at issue herein clearly has a secular legislative purpose, to wit, the facilitation of access to secular special education services by disabled students who would otherwise forbear from accepting such services (because of non-religious, cultural reasons) if offered only in the regular classes of the public schools of the Monroe-Woodbury Central School District. The prior decision by the New York Court of Appeals in *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174, acknowledged the argument

advanced by the Satmarer that their children would be traumatized if they were compelled to leave the familiarity and security of the language, lifestyle and environment of the Village to receive educational services elsewhere. The statute accommodates the secular educational need of the Satmarer disabled students by facilitating access to bilingual, bicultural special educational services at a secular learning environment which is not perceived by them as inhospitable to their unique culture and traditions.

(B) The Statute has a Primary Effect Which Neither Advances nor Inhibits Religion

While the "secular purpose" prong inquires into what government intended, the "primary effects" prong of *Lemon, supra,* looks to the actual effect of the disputed action. The New York Court of Appeals recognized that the "primary effect" prong went beyond mere funding of sectarian activities and extended to situations in which there existed "a close identification of the responsibilities of government and religion" (81 N.Y.2d at 527). It concluded that the statute creating the Kiryas Joel Village School District effected a symbolic union of church and state which was "likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their individual religious choices" (81 N.Y.2d at 529). Thus, the Court of Appeals held that the statute had an impermissible principal or primary effect to advance religious beliefs.

The "endorsement" elaboration of the second prong of *Lemon, supra,* has its genesis in the

concurrences of Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and in *Wallace v. Jaffree*, 472 U.S. 38 (1985). The concept finds full expression in Justice Brennan's opinion for the Court in *Grand Rapids School District v. Ball*, 473 U.S. 373, 389-390 (1985), in which the Court stated the principle as follows:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.
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> * * *
>
> It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement and by the nonadherents as a disapproval, of their individual religious choices. The inquiry of this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years.

Thereafter, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, et al.*, 492 U.S. 573 (1989), Justice Blackmun reaffirmed the increasing importance of the concept of

endorsement as the core component of the second prong of *Lemon*. Recognizing that the term is not self-defining, the Court noted that government impermissibly endorses religion if it conveys a message that "religion or a particular religious belief is *favored* or *preferred*" (*Id.*, at 593). "Whether the key is 'endorsement', 'favoritism', or 'promotion', the central principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community. *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring)." (*Id.*, at 593-594.)

Under Justice O'Connor's elaboration of *Lemon*, *supra*, an "objective observer" forms a perception of governmental action on the basis of his or her "familiarity with the text, legislative history, and implementation of the statute" (*Wallace*, *supra*, at 76). Such an observer would, of course, be "...acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption" (472 U.S. 38, 83).

We respectfully submit that the construct of the "objective observer" produces at best a variable and inconsistent analytic framework for identifying Establishment Clause violations. Perceptions oft define reality in a quixotic and unpredictable manner. Professor McConnell has noted that "[w]hether a particular governmental action appears to endorse or disapprove religion depends upon the presupposition

of the observer...".[4] He suggests that "[w]hether an observer would 'perceive' an accommodation as 'endorsement of a particular religious belief' depends entirely upon the observer's view of the proper relationship of church and state"[5] and argues that "[i]f Justice O'Connor's 'objective observer' standard is adopted by the courts, we would know nothing more than that judges will decide cases the way they think they should be decided".[6] Similarly, Professor Paulsen suggests that the standard is "merely a cloaking device, obscuring intuitive judgments made from the individual judge's own personal perspective. There is nothing 'objective' (in the sense of some standard external to the judge's own intuitions) about the inquiry."[7] Thus, the fiction merely serves but to confirm or legitimatize by an after-the-fact labeling process, the pre-existing prejudices of the observer.

The New York Court of Appeals found that an impermissible message of endorsement was conveyed where a state created a public school district whose boundaries were coterminous with an existing governmental unit whose residents shared a common religious heritage. We submit that such an approach is constitutionally flawed. In our diverse

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4 Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 148.

5 *Id.*

6 Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 48.

7 Michael Stokes Paulsen, Lemon is Dead, 43 Case & Western Law Rev. 795, 816.

nation, there are numerous governmental units including towns, villages, local improvement districts and school districts where, by reason of chance, choice or freedom of association, substantially all of the residents may share a common religious heritage. This fact alone obviously does not disqualify such individuals from receipt of purely secular services offered to all citizens alike without regard to their religious affiliation, if any. No one would dare to suggest that the residents of the Village of Kiryas Joel should be denied public safety services including police and fire protection, public water supply, refuse removal or other traditional governmental services solely because of the religious composition of the underlying community, nor would anyone dispute the proposition that even religious individuals have legitimate secular needs which the state must meet under principles of equal protection of law. To accept the premise that the nature of the community, as opposed to the nature of the services to be provided, restricts the availability of governmental programs which are wholly secular and neutral and which are offered to a class defined without reference to religion is to place a unique burden or disability upon religious individuals who have voluntarily chosen to live together in furtherance of their traditions. Such action would impose a special burden upon their Free Exercise rights and would constitute overt hostility, rather than neutrality toward religion.

In *McDaniel v. Paty*, 435 U.S. 618 (1978), this Court struck as unconstitutional a Tennessee statute which disqualified ministers from serving as delegates to the state's constitutional convention on the ground that such statute penalized a minister's free exercise

of his constitutional right to seek public office without foregoing his religious vocation. The minister was forced to choose between his right to public office and the surrendering of his religious ministry, a condition the Court found to be unconstitutional. This Court noted:

> However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts. (At 629.)

The Kiryas Joel Village School District Board, as most New York State school boards, is elected by the residents of the community at a school district election held pursuant to the State's Education Law. The trustees may share a common religious heritage, but there is no evidence to suggest that they will not be faithful to their oaths of office to administer the affairs of the District in accordance with the Constitutions of the United States and the State of New York.[8] To draw an inference that they may be

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[8] Article 13, § 1 of the Constitution of the State of New York prescribes the form of the constitutional oath of office to which all public officers, including school board members, must subscribe. The oath provides:

> "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully

faithless to their oaths based solely upon their shared faith does violence to our constitutional heritage. Are deeply religious individuals presumptively suspect as less capable of civic governance than non-religious individuals? Clearly, this cannot be so! Yet, the New York Court of Appeals in this instance perceived an identity based solely on the shared faith of the school members between the performance of the secular obligations of the board of education and the religious traditions of the Satmarers' shared faith, which in some indefinable manner rendered the school district itself an instrumentality in furtherance of the religious objectives of the Satmarer.

Justice Bellacosa, who authored the dissenting opinion in the Court below, stated that "...the establishment of a union free school district geographically identical to an incorporated municipality, in the context of the constitutional and statutory guarantees of public education, neutral religious rights and nondiscrimination provided by both Federal and State law, should not be stigmatized as aid to a particular denomination, simply because the inhabitants of that municipality are predominantly or even exclusively members of that denomination" (81 N.Y.2d 518, 557). We believe that Justice Bellacosa is correct in placing the constitutional focus upon the nature of the services to be provided, rather than upon the religion of the recipients, where the services themselves are completely secular and are of a type offered to students without regard to religion (*Cf. Zobrest v. Catalina Foothills School District*, U.S. ___, 113 S.Ct. 2462 [1993]; *Witters v. Washington*

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discharge the duties of the office of ....., according to the best of my ability".

Department of Services for the Blind, 474 U.S. 481 [1986]). Thus, in *Zobrest, supra*, this Court very recently sustained the constitutionality of the assignment of a sign-language interpreter under the Individuals With Disabilities Education Act (Title 20 U.S.C. § 1400 *et seq.)* to a deaf student who attended a sectarian school, where the service was "...part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the I.D.E.A., without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" (113 S.Ct. 2462, 2467).

The act creating the Kiryas Joel Village School District does not advance the religious interests of the disabled students within the Village but rather facilitates their access into secular programs offered without regard to religion which are designed to remediate identified educational disabilities. Thus, no message of endorsement for Satmarer theology, or, more particularly, for its separationist tenets, could be drawn by the "objective observer" from the manner in which programs and services are actually offered to students attending the school.

The objective observer would of course be familiar with the protracted controversy, including years of litigation between the Board of Education of the Monroe-Woodbury Central School District and the parents of disabled students residing within the Village with respect to the manner of provision of programs and services for the disabled students residing within the Village. The observer would note that the Legislature took pains to craft a statute which facilitated access yet imposed as the *quid pro quo* the requirement that such programs and services be

furnished in a wholly-secular manner by public employees at a public site. Secularism is antithetical to Hasidism, yet secularism predominates within the Kiryas Joel Village School. Employees are hired in accordance with applicable federal and state law, rules and regulations, including those specifically prohibiting employment discrimination on the basis of sex, race, color, creed, religion, national origin and disability. English is the language of instruction within the School, in sharp contrast to Yiddish, which is the medium of communication within the Village itself. Male and female students are grouped together for instructional purposes, a practice which does not occur within the religious schools in the community. Instructional materials are not based upon the sex of the student being instructed, again a practice inconsistent with the parochial schools.

The physical appearance of the building is secular, including the very significant absence of mezuzahs on the doorposts. The school follows a secular academic calendar. The religious prohibition against female employees exercising supervisory authority over male employees is not followed within the School. Employees dress in a secular manner.

The objective observer could not fail to take note of the antiseptic, secular environment within the public school and contrast it with the rich traditions within the surrounding community and its sectarian schools. He or she would observe that the public school district has followed the Individuals With Disabilities Education Act and has developed an individualized education program for each child within the School, which identifies the specific programs and services which are necessary and

appropriate to remediate that child's disabilities. Thus, the instruction being offered is in each instance entirely secular and is tailored to remediate specific disabilities.

Additionally, an objective observer who was familiar with the legislative history of the Act would also be aware of the fact that the bill which ultimately became the Chapter was enacted by overwhelming majorities in both Houses of the State Legislature by legislators who were not Hasidic and that the bill was approved by a Governor who was not Hasidic. The observer would be aware of the fact that the County Executive of the County in which the school district is located urged executive approval for the bill, as did the Board of Education of the Monroe-Woodbury Central School District, from whose territory the school district was created. Thus, the observer would note the widespread support and approval enjoyed within the non-Satmarer community for the legislative solution toward what had previously proven to be an intractable dispute where access was conditioned upon principles of secularism. Markedly, the observer would not find any factual support for the proposition that non-adherents directly affected by the law regarded the statute as a disapproval of their own religious choices. The non-Satmarer institutions most directly affected by the law, the County and the Monroe-Woodbury Central School District, each specifically supported the bill which was enacted into law.

This Court's recent holdings in the "access" cases instruct that where pursuant to a statute or practice a governmental body provides access to its property on a non-discriminatory basis, the mere neutral act of

facilitating access will not be perceived as an endorsement of the resultant activities. In *Widmar v. Vincent*, 454 U.S. 263 (1981) and thereafter in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), this Court sustained the constitutionality of governmental actions which facilitated equal access to public facilities for religious speech-related activities. In *Widmar, supra*, this Court held that where a university had customarily made its facilities available for general use by student organizations, it could not thereafter selectively exclude a prospective user on the basis of the proposed religious content of its contemplated message. Similarly, in *Mergens, supra*, this Court, applying the federal Equal Access Statute (98 Stat. 1302, 20 U.S.C. §§ 4071-4074), extended *Widmar* to require equal access for religious speech activities by secondary students, where the school had opted to make its property available for non-curriculum related activities. In *Mergens*, this Court noted that high school students would not be likely to "confuse an equal access policy with state sponsorship of religion" (496 U.S. 226 at 250).

This Court's very recent decision in *Lamb's Chapel v. Center Moriches U.F.S.D.*, ___U.S. ___, 113 S.Ct. 2141 (1993), further reflects the proposition that the neutral act of facilitating access does not necessarily equate to an endorsement of the resultant activities.[9] In *Lamb's Chapel, supra*, this Court found

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[9] Again, it should be noted that the Kiryas Joel Village School District is a public school in all respects. Thus, the access cases are cited merely for the concept that facilitation of access even in the more-extreme case of religious speech on a neutral basis should not be perceived by an objective

"no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or the Church would have been no more than incidental" (*Id.*, at 2148).

All disabled students are entitled by federal and state law to access to programs and services appropriate to meet their special education needs (Title 20 U.S.C. § 1400 *et seq.*; Education Law, Article 89). The Individuals With Disabilities Education Act (I.D.E.A.) specifically mandates inclusion of private (including parochial) school students within the programs and services required by the Act (Title 20 U.S.C. § 1413[a][4][A]; Title 34 C.F.R. §§ 300.341[b]; 300.349; 300.400–300.452). In *Zobrest, supra,* this Court rejected the argument that a statute which facilitated access by a parochial school student to the services of an I.D.E.A.–funded sign language interpreter on the premises of a parochial school advanced the religion of such student in violation of the First Amendment. This Court in *Zobrest, supra,* held that the federal statute created no federal incentive for any parent to choose a sectarian school, nor did any public moneys find their way into the coffers of the religious institution. Thus, the only benefit which the school received was indirect and attenuated. In addition, the religious school was not relieved of any costs it would otherwise have been compelled to bear in educating its students as a result of implementation by the public school of its mandate under the I.D.E.A. to include students without regard to the "religious-non-religious" nature of the schools

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observer as an endorsement of the resultant activities.

which such children attended in programs and services under the Act. That holding is directly relevant hereto.

The New York State Legislature has enacted a statute creating a public school district as the vehicle for offering secular education services to all residents of a defined, pre-existing governmental entity, without regard to the religious or non-religious preferences of the students or their parents. It strains credibility to suggest that the provision of entirely-secular educational services at a public site by public employees to disabled children sharing a common religious heritage has the primary effect of advancing the *religious* precepts of such students solely because of their shared religious heritage, where the services themselves are secular in nature. It should be emphasized that the Kiryas Joel Village School District, unlike the parochial school before the Court in *Zobrest, supra,* is a public school in all respects. Although all students in attendance at the School may share a common religious heritage (although in fact some tuition students sent to the District's unique bilingual and bicultural special education programs by other school districts are not Satmarer Hasids), this Court has repeatedly held that this factor in and of itself will not serve to invalidate a program which furnishes secular educational services through public employees at a public site *(Wolman v. Walter,* 433 U.S. 229 [1977]).

The creation of the Kiryas Joel Village School District does not result in the diversion of any public funds to the parochial schools within the Village or to the religious institutions therein, nor have the parochial schools in the underlying community been

relieved of any significant burden they would otherwise have been compelled to bear (*Cf. Grand Rapids School District v. Ball*, 473 U.S. 373 [1985]). If the Kiryas Joel Village School District ceased to exist, the burden for providing programs and services for the disabled students residing within the Village would devolve by federal and state law upon the Board of Education of the Monroe-Woodbury Central School District, from whose territory the school district was created. The Monroe-Woodbury Central School District would thereafter be required to meet such needs of such children in accordance with the mandate of the I.D.E.A. and the State's counterpart legislation. Even were there no Village School District, the parochial schools within the Village would still not be compelled to bear the cost of furnishing a secular special education program to resident disabled students. In that instance, the underlying legal responsibility for providing the free appropriate public education required by law would revert to the public school district of residence, even in instances where the parent opts for a parochial school placement for his or her own child. Thus, the parochial schools receive no direct benefit or indirect subsidy from the statute creating the Kiryas Joel Village School District, as might occur where a public school official district takes over a "substantial portion of the responsibility of teaching secular subjects" (*Cf. Grand Rapids, supra*, at 397). In view of the foregoing, it is clear that the Act does not advance the religious interests of the Satmarer and does not directly benefit the religious institutions within the community, except in an indirect or attenuated manner. To the contrary, it addresses a legitimate secular need of the disabled students through appropriate secular means, and thus the Act has a permissible

secular primary effect which is consistent with the second prong of the *Lemon* test.

(C) The Statute does not Foster an Excessive Entanglement between Church and State

The statute creating the Kiryas Joel Village School District does not foster an excessive entanglement between church and state, because the resulting public school district offers programs and services to disabled students at a public site through public employees. Thus, there is no need to institute "...a comprehensive, discriminatory, and continuing state surveillance...to ensure that [the statutory] restrictions are obeyed and the First Amendment [is] otherwise respected" *(Lemon v. Kurtzman,* 403 U.S. 602, 619 [1971]).

The public nature of the resulting facility in the instant case readily distinguishes the activities from those previously invalidated by this Court in *Meek v. Pittinger,* 421 U.S. 349 (1979) and in *Aguilar v. Felton,* 473 U.S. 402 (1985). In those cases, this Court found that the assignment of public employees to provide academic instruction within the pervasive sectarian environment of the parochial schools created an intolerable risk that the public employees would overtly or subtly conform their instruction to the religious environment of the facility or might otherwise intertwine religious doctrine with secular instruction, in violation of their constitutional obligation to remain ideologically neutral. Thus, pervasive monitoring by public employees would be required to guard "against the infiltration of religious thought" *(Aguilar, supra,* at 413). Ironically, the "very

supervision of the aid to ensure that it does not further religion renders the statute invalid" (*Bowen v. Kendrick*, 487 U.W. 589, 615 [1988]).

In *Wolman v. Walter*, 433 U.S. 229 (1977), this Court explained that the danger inherent in the assignment of public employees to give academic instruction in church-related schools arose "not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course" (*Id.*, at 247). In *Wolman, supra*, however, this Court sustained the constitutionality of provision of certain therapeutic, guidance and remedial services to parochial school students in public centers or in mobile units off the non-public premises. This Court held that so long as the mobile instructional units were not physically or educationally identifiable with the functions of the non-public school, the program was constitutional despite the fact that on occasion such units might serve only the needs of sectarian school students. The Court stated:

> The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek*. The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils. (433 U.S. at 247, 248.)

This Court then addressed the issue of whether supervision by public school officials of public employees assigned to mobile units created a potential for impermissible excessive entanglement. The Court rejected the contention, saying;

> Neither will there be any excessive entanglement arising from supervision of public employees to ensure that they maintain a neutral stance. It can hardly be said that supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. (433 U.S. at 248.)

Thereafter, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court refused to invalidate a statute which on its face authorized federal grants both to non-sectarian and to religiously-affiliated organizations for services and research in the area of premarital adolescent sexual relations and pregnancy. This Court held that while it was foreseeable that some proportion of the recipients of government aid would be religiously-affiliated, only a small portion of these could be identified as "pervasively sectarian". The Court distinguished between grants-in-aid to religious institutions which were "pervasively sectarian", as in the case of parochial elementary and secondary schools, and other grants to religious organizations which were not "pervasively sectarian", holding that the latter would require less intrusive monitoring and thereby cause the Government to intrude to a lesser degree in the day-to-day operation of the religiously-affiliated AFLA grantees. Such degree of grant monitoring, the Court noted,

"does not amount to 'excessive entanglement', at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily 'pervasively sectarian'" *(Id.*, at 617).

The Court below made no finding with respect to the applicability of the third prong of the *Lemon* test, but, rather, based its holding exclusively on the finding that the statute violated the "primary effects" test. However, should this Court choose to utilize the *Lemon* test as the benchmark for determining the constitutionality of the statute at issue, clearly, the act creating the Kiryas Joel Village School District has not and can not foster an excess of entanglement between church and state, because, as this Court has clearly and unequivocally noted, there can be no excessive entanglement arising from the supervision of public employees at a public site *(Wolman, supra)*.

POINT II.

THE STATUTE REPRESENTS A VALID PERMISSIVE ACCOMMODATION UNDER THE FIRST AMENDMENT

Professor Tribe argues for the existence of a "zone of permissible accommodation"[10] at the intersection where the two religion clauses meet. He suggests that at such point, "the free exercise clause dominates the intersection, permitting the accommodation of religious interests".[11] The decisions of

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10 Tribe, American Constitutional Law § 14-4, at 1169 (2nd Ed.).

11 *Id.*

this Court support the viability of the concept of permissive accommodation and the appropriateness of the application of the doctrine to the statute creating the Kiryas Joel Village School District.

In *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987), this Court has frankly acknowledged that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause". Similarly, Justice Brennan in his dissenting opinion in *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) suggested that "even when a government is not compelled to by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion". To the same effect, see *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987), wherein the Court noted: "There is ample room under that [Establishment] Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

In *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 673 (1970), this Court acknowledged that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself". Furthermore, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, et al.*, 492 U.S. 573, 613 (1989) at Footnote 59, this Court noted that the "scope of accommodations permissible under the Establishment Clause is larger

than the scope of accommodations mandated by the Free Exercise Clause".

Professor McConnell suggests that government may be in a better position than the courts to "...evaluate the strength of its own interest in governing without religious exemptions";[12] thus "[w]here the government determines that it can make an exception without unacceptable damage to its policies, there is no reason for a court to second-guess that conclusion, unless the constitutional rights of other persons are adversely affected. Such a determination advances the pluralistic goals of the First Amendment".[13] He argues that the government may enact laws or policies which "have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion"[14] and suggests the distinction between legitimate accommodation and impermissible "Establishment" is that "the former merely removes obstacles to the exercise of a religious conviction adopted for reasons independent of the government's action, while the latter creates an incentive or inducement (in the strong form, a compulsion) to adopt the practice or conviction".[15]

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12 McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 31.

13 *Id.*

14 McConnell, Accommodation of Religion: an Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685, 686 (1992).

15 *Id.*

Professor Tribe notes that "[l]eaving room for legislatures to draft religious accommodations recognizes that they may be in a better position than courts to decide when the advantages of strict neutrality are overstated".[16]

The Court below inferentially held that because in its view religion permeated and infused all aspects of daily life within the Village, *ipse dixit* the statute creating the Kiryas Joel Village School District necessarily advanced the religious interests of the Satmarer rather than merely accommodated their request for secular special educational services at the functional equivalent of the neutral site authorized by this Court in *Wolman v. Walter*, 433 U.S. 229 (1977). While it is clear from the Record below that the statute channels secular services through a popularly-elected board of education directly to disabled students at a statutory secular location through the use of public employees, the Court of Appeals nevertheless regarded this permissible legislative accommodation as a submission to the dictates of a religious community as to where secular services should be provided. Similarly, the Court below inappropriately regarded the legislative decision to accommodate, which was well within its permissive authority, as "yield[ing] to the demands of a religious community whose separationist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices" (81 N.Y.2d at 531).

It should be noted that the prior decision of the Court of Appeals in *Board of Education of the*

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16 Tribe, American Constitutional Law, § 14-7, at p. 1195 (2nd Ed.).

Monroe-Woodbury Central School District v. Wieder, et al., 72 N.Y.2d 177, which decision served, at least in part, as the catalyst for the legislation at issue, acknowledged the argument of the Satmarer that "they should be exempted from public school placements only for *nonreligious* reasons—most particularly because of the emotional impact on the children of travelling out of Kiryas Joel" (72 N.Y.2d at 189) (emphasis in original). Similarly, the legislative findings which prompted enactment of the statute also stressed the secular nature of the accommodation to be effectuated by the statute by conditioning provision of secular special educational programs and services within the context of a public school placement by public employees at a public site. If the accommodation also met the religious preferences of the Satmarer, this is not a legal basis for invalidating it (*Bowen v. Kendrick*, 487 U.S. 589 [1988]).

Even if this Court concludes that the primary effect of the statute is to accommodate religious rather than secular (or some hybrid mixture of the two) interests of the disabled Satmarer students, the Court should nevertheless sustain the legislative judgment as to the necessity for and appropriateness of such accommodation as the alleviation of a burden upon the Free Exercise rights of the Satmarer. No party to the within litigation claims that the accommodation at issue, *i.e.*, the creation of the Kiryas Joel Village School District, was required by the First Amendment's Free Exercise Clause. Rather, the issue before this Court is whether the creation of the District *per se* constitutes a violation of the Establishment Clause.

Justice Bellacosa, who authored the dissenting opinion below, put the issue in proper perspective. He stated:

> The unmistakable reality of this case is that the stricken legislation tried to create a secular public school for pupils with special education needs. The Majority concludes that the effort fails. Yet, the new public school district offers programs and services at odds with many basic precepts of Satmarer Hasidism, yet secularism is the *quid pro quo* imposed by the State for these Village residents to avail themselves in this way of State-regulated special educational services for their handicapped youngsters. Though the Legislature bent over backwards, as a last resort, to address the legitimate special education needs of the Satmarer students, it did not bend to the theology of their families or community *(see generally, Tribe, American Constitutional Law* § 14-7, at 1195 [2d ed]).

If, despite the strong legislative history to the contrary, this Court chooses to regard the Satmarer's traditional preference for separate education for their children apart from social and cultural forces within the broader heterogeneous society as being inherently religious in nature, then the analogy to the accommodation granted by the Legislature to exemption from compulsory attendance requirements which this Court recognized for the Amish in *Wisconsin v. Yoder,* 406 U.S. 205 (1972) becomes even more striking. In *Yoder, supra,* this Court recognized the centrality of a "life in a church

community separate and apart from the world and worldly influences" (406 U.S. at 210) and the necessity for maintaining cultural boundaries and distance from outside influence as essential to the continued existence and physical survival of the Amish community. As a consequence thereof, it relieved the Amish from the burden of complying with the State's compulsory attendance rules, where compliance would subject their students to the worldly, modern influences of public school systems whose values are by their very nature inconsistent with the insular, traditional values of the Amish.

The parallel between *Yoder, supra,* and this case is compelling. In each, an insular religious group whose traditions and practices may be regarded as idiosyncratic by the broader community seeks protection through accommodation from the worldly influences which it perceives will subvert the values it holds to be traditional and central to its faith. The New York State Legislature in this case has recognized the appropriateness of granting the accommodation because of the special vulnerability of the disabled Satmarer students to an outside world from which their culture, religion, language and manner of dress immediately sets them apart, but it has conditioned the accommodation upon complete secularization of services within a non-sectarian learning environment. Absent such accommodation, the history of the protracted litigation between the Monroe-Woodbury Central School District and the Satmarer demonstrates that few, if any, Satmarer would actually accept programs and services for their children if offered in the regular classes of the public schools of the Monroe-Woodbury Central School District. Thus, the Legislature could take note that

the practical effect of offering programs and services within the context of a Monroe-Woodbury placement is *de facto* to place a burden upon the sect's Free Exercise right in which the observant Satmarer is compelled to choose between acceptance of services in a context which is unacceptable to his or her tradition and lifestyle or to forbear from receipt of the special educational services which his or her child desperately requires and is otherwise entitled to receive. "That accommodation in these circumstances, on a facial attack and analysis, is supportable as a permissible deference to the historical and evolved predominance of Free Exercise protection in First Amendment constitutional adjudication" (dissenting opinion of Justice Bellacosa, 81 N.Y.2d at 559).

The Court below failed to distinguish between an accommodation which takes religion into account and an accommodation enacted *for the purpose of advancing religion.* In *Neuchterlein,* Note, *The Free Exercise Boundaries of Permissible Accommodation under the Establishment Clause,* 99 Yale L. J. 1127 (1990), the author suggests that courts must distinguish between those laws which take religion into account and those which were enacted for the purpose of advancing religion. He suggests that a law accommodating religious belief is not the same as one which purposefully advances it. Illustrative of the former are laws allowing sacramental use of wine during Prohibition and sacramental use of peyote by certain Native Americans and laws authorizing a "moment-of-silence", where Legislatures have acknowledged a religious belief held by some citizens but have not purposefully advanced it. The author characterizes this phenomenon, the accommodation of the religious beliefs of others as a

respectful thing to do rather than for the purpose of advancing such beliefs, as a form of "secular respect". He notes that "[a]ccommodating these people simply reflects the government's secular respect for their right to choose their way of life". We believe that the distinction is relevant hereto.

Justice Souter in his concurring opinion in *Lee v. Weisman*, 505 U.S. ___ , 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), speaks eloquently with respect to the necessity for accommodation as an expression of secular "respect for, but not endorsement of, the fundamental values of others". He notes:

> That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. See, *e.g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); see also *Sherbert v. Verner*, 374 U.S. 398 (1963). Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief.
>
> In everyday life, we routinely accommodate religious beliefs that we do not share. A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express respect for, but

not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

The government may act likewise. Most religions encourage devotional practices that are at once crucial to the lives of believers and idiosyncratic in the eyes of nonadherents. By definition, secular rules of general application are drawn from the non-adherent's vantage and, consequently, fail to take such practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all. (At 112 S.Ct. 2649, 2676-77.)

Chapter 748 of the Laws of 1989 accommodates a purely secular interest of the Satmarer by facilitating access by their disabled students to bilingual, bicultural special education programs. It relieves them of a burden upon their Free Exercise rights by enabling them to accept programs and services within the context of the statutory equivalent of the "neutral site" in a secular learning environment designed to be more receptive to and protective of the special and particular psychological vulnerabilities of the disabled Satmarer students.

An otherwise valid accommodation should not be set aside because it meets the religious preferences of a particular religious organization *(Bowen v. Kendrick,* 487 U.S. 589 [1988]). To the same effect, see *Clayton v. Place,* 884 F.2d 376 (8th Cir., 1989) *cert. den.* 494 U.S. 1081 (1990), in which the Court of Appeals for the Eighth Circuit specifically held that the mere fact that a governmental body took an action which coincided with the principles or desires of a particular religious group did not "transform the action into an impermissible establishment of religion" (at 380). To the contrary, invalidation of an otherwise valid secular act merely because it coincides with the religious objectives of a particular religious group would constitute overt hostility to religious precepts rather than neutrality and would thus violate the Free Exercise clause".

This Court should not lightly set aside the political judgment of the New York State Legislature which has determined that the State's more generalized interest in fostering heterogeneous student populations was not impaired by the granting of an accommodation to the Satmarer to facilitate access by their disabled students to special education programs and services in a separate but secular public educational setting. Further, it should not question the Legislature's assessment that the weight of such generalized policy was not significant enough to overcome the appropriateness of the granting of the accommodation at issue herein. The State's own political processes should properly evaluate the strength of a state's interest and the appropriateness of granting accommodations therefrom within the permissive zone of accommodation between the

religion clauses, where the constitutional rights of third parties are not affected thereby.

POINT III.

THE *LEMON* TEST SHOULD BE REVISITED IF SUCH ACTION IS NECESSARY TO SUSTAIN THE CONSTITUTIONALITY OF THE STATUTE

We respectfully submit that the statute creating the Kiryas Joel Village School District has a secular legislative purpose, does not have a primary or principal effect which advances or impedes religion and does not foster an excessive governmental entanglement with religion as those terms have been defined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and its progeny. Furthermore, if this Court regards the statute as accommodating the religious (as opposed to secular educational) needs of the disabled Satmarer students, the statute should nevertheless be sustained as a valid permissive alleviation of a burden upon their Free Exercise rights by enabling the Satmarer to accept such services in a manner consistent with their tradition of cultural isolation and maintenance of distance from worldly influences.

If this Court determines that the statute at issue is inconsistent with the precepts of *Lemon, supra*, and is not a permissive legislative accommodation thereunder, then we respectfully urge the Court to reconsider *Lemon* and to replace it with an analytic framework which is more amenable to accommodation of the secular needs of religious individuals. This Court in *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649 (1992), very recently declined to adopt various

alternatives to *Lemon, supra,* predicated upon a "textualist" or "non-preferentialist" model or to adopt a test which would have identified coercion or coercive practices as the core element of an Establishment Clause violation. None of these alternatives appears to have garnered the clear support of a majority of the Justices of this Court, and the recent change in the composition of the Court will no doubt have further implications with respect to the continued viability of *Lemon*.

A specific vehicle can bear only so much weight. Perhaps the basic practical difficulty with *Lemon* is that the courts have attempted to apply the three-pronged test to such disparate activities as display of religious symbols; funding of educational programs and services within sectarian schools; prayer and prayer-related activities; speech-related religious access to public property; and the viability of permissive accommodations. This Court should revisit the issue whether any one specific test can fairly assess the constitutionality of such a broad range of activities or whether a series of more program or activity-specific tests should be formulated in lieu thereof to analyze governmental action against the core principles inherent in the Establishment Clause. The *Lemon* test has become the proverbial Procrustean bed upon which facts are laid without adequate differentiation as to individual differences. The results are sometimes harsh and often unpredictable.

Professor Stephen L. Carter in *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993) suggests that this Court should be more receptive to accommodations which

alleviate burdens on religious groups' Free Exercise rights. He notes:

> It is difficult, however, to see how the law can protect religious freedom in the welfare state if it does not offer exemptions and special protections for religious devotion. To offer religions the chance to win exemptions from laws that others must obey obviously carves out a special niche for religion, but that is hardly objectionable; carving out a special place for religion is the minimum it might be said that the Free Exercise Clause does. (At 133-134.)

Professor Carter urges the reinstatement of the "compelling state interest test" as the appropriate analytic framework for evaluating claims for exemption (or accommodation) from burdens upon religious devotion. Professor Carter suggests:

> Translating this principle into law, one would say that the central acts of faith of a religious community—the aspects that do the most to produce shared meaning within the corporate body of worship—are entitled to the highest solicitude by the courts, and, therefore, when infringing on those central acts, the state must offer a very convincing reason. As the acts of faith that the state seeks to regulate or forbid become less central, the state's burden of justification grows less. (At 143.)

Indeed, Congress itself has mandated a similar statutory approach to the restoration of religious exemptions through the enactment of the Religious Freedom Restoration Act of 1993, Public Law 103-141 (107 Stat. 1488 [1993]), which statute has as its primary

purpose to overrule this Court's decision in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872 (1990), and to restore the "compelling state interest" test in evaluating legitimacy of exemption of religious activities from laws of general application.[17]

In *Smith, supra,* this Court significantly altered the manner in which courts must now evaluate free exercise claims and severely limited the right of individuals to secure religiously-based exemptions from statutes of general applicability. The decision in *Employment Division, supra,* held in essence that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" *(Id.* at 494 U.S. 872, 879). This Court, however, specifically retained the prior standard articulated in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and in *Wisconsin v. Yoder, supra,* for what it characterized as "hybrid" situations, as where a free exercise claim

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17 The Act, in pertinent part, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)", which subsection provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" (Bill §§ 3[a] and [b]).

is connected with a communicative activity or parental right, such as a right to raise one's children in accordance with his or her religious beliefs. Thus, the constitutionality of the permissive legislative accommodation at issue herein would—notwithstanding *Smith, supra,* or the restorative provisions of Public Law 103-141—continue to be determined by reference to the "compelling state interest" test articulated in *Yoder, supra.*

If *Lemon* is not susceptible to a construction which sustains the constitutionality of Chapter 748 of the Laws of 1989, then we respectfully suggest that this Court should not hesitate to overrule it and to replace it with general principles recognizing the constitutionality of permissive, noncoercive legislative accommodation of the purely secular interests of religious individuals. This case, involving the creation of an entirely secular public school district to meet the identified educational needs of disabled Satmarer students, provides the ideal vehicle to revisit *Lemon* and, if necessary, to overrule it.

CONCLUSION

For the foregoing reasons, the appeal should be granted, and an order of remittitur should be entered directing the Court of Appeals of the State of New York to enter judgment declaring the facial constitutionality of Chapter 748 of the Laws of 1989 of the State of New York.

Dated: Northport, New York
January 19, 1994

Respectfully submitted,

INGERMAN, SMITH, GREENBERG,
GROSS, RICHMOND, HEIDELBERGER,
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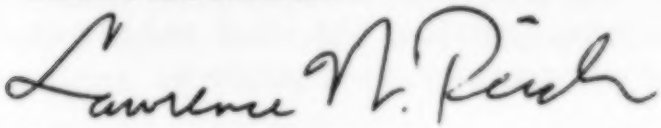

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